Tentative Rulings for August 9, 2000
Department 72 and 34

There are no tentative rulings for the following cases. The parties should appear at the hearing.

590558-3 Salazar v. ARC Fresno

642593-8 G. E. Capitol Assurance v. Burden, et al.

646149-5 Holmes v. Rasmussen

635628-1 County of Fresno v. County of Fresno

640596-3 Jalomo v. Inostros

(Tentative Rulings begin at next page)

Tentative Ruling

Re: ***Roberts v. Community Imaging Medical Group et al.***
Superior Court Case No. 634181-2

Hearing Date: August 9, 2000 (Dept. 34)

Motion: Motion for leave to file a second amended complaint

Tentative Ruling:

To grant plaintiff's motion for leave to file a second amended complaint. The court may grant leave to amend the complaint at any stage of the proceeding. Amendments may be made any time at or before trial "in the furtherance of justice". CCP §473, §576. The decision whether to grant leave to amend is addressed to the sound discretion of the court. However, denial of leave to amend is rarely justified. ***California Casualty General Insurance Co. v. Superior Court*** (1985) 173 Cal.App.3d 274, 284.

The court finds that allowing the proposed amendment will further the strong judicial policy favoring liberal amendments so that all disputed matters between the parties can be resolved in the same lawsuit. ***Nestle v. Santa Monica*** (1972) 6 Cal.3d 920, 939. The court finds that there is no evidence that the plaintiff has been dilatory in seeking the proposed amendment nor is there any evidence that the defendants have been prejudiced by any delay. ***Hirsa v. Superior Court*** (1981) 118 Cal.App.3d 486, 490, ***Higgins v. DelFaro*** (1981) 123 Cal.App.3d 558, 564-565.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order. Plaintiff is granted 10 days to file a 2nd amended complaint. All new allegations are to be set in **boldface.**

Tentative Ruling

Re: ***Marin v. Singh*, *et al.***
Superior Court Case No: 628604-1
(and consolidated action)

Hearing date: August 9, 2000 (Dept. 72)

Motion: To transfer and consolidate

Tentative Ruling:

To deny without prejudice. The proof of service does not indicate the motion was served on the Tulare County Superior Court or on the party in case no. 99 188908, as required by CCP § 403.

Pursuant to CRC 391(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Lee v. Hernandez*, *et al.***
Superior Court Case No: 651145-5

Hearing date: August 9, 2000 (Dept. 72)

Motion: Demurrer and motion to strike answer

Tentative Ruling:

To overrule the demurrer. To grant the motion to strike paragraph 20 and item 3 of the Prayer from Hernandez's answer without leave to amend. CCP §§ 436, 431.30(c).

Pursuant to CRC 391(a) and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: **Nottoli CMC v. City of Fresno, et al.**
Superior Court Case No. 535260-4

Hearing Date: August 9, 2000 (Dept. 72)

Motion: Of Defendants to Permit Exchange of Expert Witness Information and to Shorten Discovery Stay or, in the Alternative, for Relief from Failure to Disclose Expert Witness Information

Tentative Ruling:

To deny the motion in its entirety.

Defendants have essentially presented three bases for this motion. First, defendants believe that the original demand served by plaintiff was no longer effective once the first trial continuance was agreed to and ordered. They then cite CCP § 1258.210, which provides that a demand for exchange of expert information must be made no later than the 10th day after the trial date is selected, and that if no such demand is served, the court may, upon noticed motion and a showing of good cause, permit any party to serve a later demand. They also cite ***Nestle v. City of Santa Monica*** (1972) 6 Cal.3d 920, to argue that that trial courts should compel the pretrial exchange of expert information. Defendants' reasoning seems to be, then, that since the original demand had been extinguished, and no new demand was served by February 20, 2000 (10 days after the most recent Stipulation and Order), they can now move under § 1258.210 for an order allowing them to serve a new demand.

However, the court finds that defendants' interpretation of the effect of the first (and subsequent) continuances is wrong. The Stipulations and Orders did not operate to extinguish the original demand served by plaintiff. Each such document contained language indicating that all pre-trial discovery, whether already initiated or not, was to be put "on hold and stayed" until either 60 days before the new trial date, as was the case with the first three Orders, or 33 days before the new trial date, as was the case with the last and most current order. The court interprets this language to mean only that the requirement that the parties actually exchange the expert information, a requirement already triggered pursuant to CCP §§ 1258.210 – 1258.230 by plaintiff's original demand served in June 1998, was stayed, not completely abrogated, and that the parties would not be able to actually exchange the information until the stay was lifted.

Further, as plaintiff argues, defendants have taken ***Nestle v. City of Santa Monica, supra,*** out of context. This case was decided in 1972, prior to the enactment of the special eminent domain discovery statutes. When the ***Nestle*** court found that the trial court "should compel the pre-trial exchange of appraisal reports," it was only approving of the lower court's pretrial order that the parties exchange such reports. It was not making a blanket rule that trial courts should compel exchange of expert information in situations where, as here, one party had already triggered the exchange by serving a demand under § 1258.210 and the other party failed to timely exchange information.

Based on the above, CCP § 1258.210 does not apply here, defendants' reliance on it is misplaced, and the motion is denied on that basis.

Second, defendants argue that plaintiff's exchange, served on February 2, 2000, was 20 days late, because of the revision of CCP § 1258.220. Thus, they argue, no party has actually complied with the exchange statutes. They seem to argue, then, that this motion would benefit them and plaintiff. That is, since plaintiff's exchange was late and therefore ineffective, an order from the court that both sides now exchange expert information would allow both sides to properly comply and enable them to call witnesses at trial.

However, as plaintiff argues, this position completely ignores the language of the latest Stipulation and Order, entered on February 10, 2000. It may be that neither party was aware of the change in § 1258.220. But it must be presumed that all counsel read the Stipulation prior to signing it, and ¶ 4 clearly states that "Plaintiff timely deposited and served" its expert witness and valuation data information, and that defendants did not do so. Thus, not only did defendants agree, by virtue of this Stipulation, that plaintiff's exchange was timely, they also agreed that they would not rely on either the Stipulation and Order or the continuance itself as a basis for seeking relief from their own failure to serve a timely exchange. The court finds that defendants should be held to the terms of this latest Stipulation, especially since they offer no authority for the court to rule that said terms should be abrogated or ignored.

Thus, this second argument of defendants lacks merit, and the motion is denied on that basis.

Third, defendants seek relief under CCP § 1258.290. However, this statute simply does not apply here. Relief may be had pursuant to § 1258.290 only when the party seeking relief has already exchanged expert witness and valuation information, but has determined that it needs to call a witness at trial who was not disclosed in the original exchange.

Defendants here, of course, have never exchanged information. Thus, their reliance on this statute is completely misplaced, and the court need not even consider whether any failure on the part of defendants was the result of mistake, inadvertence, surprise, or excusable neglect. The court also notes that that defendants do not seek relief under CCP § 473, so their mistake or neglect need not be considered under that statute either. Thus, this third argument of defendants also lacks merit, and the motion is denied on that basis as well.

Defendants also ask that the court lift the current stay, so that they can inspect documents and the subject premises, and to conduct depositions. However, they offer no authority for this request, and it is therefore denied.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***New Hogan Lake Investors* v. *McCollum***
Superior Court Case No. 630341-6

Hearing Date: August 9, 2000 (Dept. 72)

Motion: (1) By plaintiffs for issue and monetary sanctions regarding form interrogatories (set one)

(2) By plaintiffs to compel production of documents and/or for issue sanctions and monetary sanctions

Tentative Ruling:

To deny the motion for issue and monetary sanctions regarding form interrogatories (set one), and to grant defendants' request for monetary sanctions against plaintiffs in the amount of $700.00.

To grant the motion to compel production of: (1) the letter from Mr. DeGravel to Timothy McCollum dated November 20, 1994; (2) the enclosures to Mr. DeGravel's letter to Timothy McCollum dated May 1, 1995; (3) the letter from Mr. DeGravel to Timothy McCollum dated November 9, 1995; and (4) pages 7-8 of a 10-page document described by defense counsel as "six page document (no title) dated October 2, 1995"; and to grant plaintiffs' request for monetary sanctions against defendants in the amount of $498.00.

Form interrogatory 17.1, as it relates to requests for admission #23, 48-50, and 58-117, appears to have been answered. If, ultimately, plaintiffs prove otherwise at trial, and defendants are found to have unreasonably denied these requests for admission, they may be ordered to pay the costs and fees incurred by plaintiffs in proving these matters at trial. The court is required to impose such a cost-of-proof sanction, unless defendants prove an excuse. (Code of Civ. Proc. §2033(o).)

The parties shall pay the sanctions awards to opposing counsel within 30 days of service of this minute order.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Re: ***Johnson v. University Medical Center, et al.***
Superior Court Case No. 652241-1

Hearing Date: August 9, 2000 (Dept. 72)

Motion: Demurrer and Motion to Strike of Defendant University Medical Center

Tentative Ruling:

To deny plaintiff's request for a continuance of the hearing. To sustain the demurrer as to all three causes of action, with leave to amend. Plaintiff may file a First Amended Complaint within 10 days. All new language and allegations must be shown in **boldface** type. To grant the motion to strike, without prejudice.

Plaintiff has failed to provide proper support for his request for a continuance, and the request is therefore denied.

As to the substantive issues, the court notes at the outset that plaintiff has failed to comply with California Rules of Court (hereafter "CRC") Rule 312(g), in that he has not identified the number of each cause of action. The court has assumed that the causes of action are meant to be identified as discussed below based on the order in which they were stapled together. However, plaintiff's First Amended Complaint should comply with CRC 312(g) and properly number each cause of action.

As to the demurrer to the 1st Cause of Action for "General Negligence," it is sustained with leave to amend on two bases. First, plaintiff has not clearly indicated whether University Medical Center (hereafter "UMC") is a defendant under this cause of action. Although UMC is not specifically listed on this form cause of action, plaintiff seems to imply that it may have had some alleged liability for the actions of the individual defendants when he alleges that the conduct of the physicians reflects "discredit on themselves and the University Medical Center." In addition, paragraph 8 in the main body of the form complaint seems to allege that the individuals acted within the scope of their employment or agency with UMC. Thus, this cause of action is uncertain, and plaintiff is required to clearly allege facts indicating whether UMC is liable under this cause of action. (Code of Civil Procedure [hereafter "CCP"] § 430.10(f))

Second, plaintiff is required to allege specific and sufficient facts which demonstrate (1) that defendants owed a particular duty of care to plaintiff and to identify that duty, (2) how such duty was allegedly

breached, and (3) how the alleged breach legally caused any injury to plaintiff, and to identify the particular alleged injury. Plaintiff should note that the adoption of the judicial council form complaints has not changed this fact pleading requirement. (See CCP § 425.10. Also see the discussion at Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2000) at §§ 6:120-123, 6:200.) Thus, the demurrer is sustained on the basis that plaintiff has failed to state a cause of action. (CCP § 430.10(e)) However, plaintiff is allowed leave to amend, because there is a reasonable possibility that he can state a valid cause of action for negligence. (***Blank v. Kirwan*** (1985) 39 Cal.3d 311, 318.)

The demurrer to the 2nd Cause of Action for "Intentional Tort" is also sustained with leave to amend, on two bases. First, there do not appear to be any allegations of direct involvement or liability on the part of UMC under this cause of action, or any direct implications that the individual defendants were acting on behalf of the medical center (as was the case under the 1st Cause of Action). However, as noted above, paragraph 8 in the main body of the complaint appears to allege that the individual defendants were acting within the scope of their employment or agency with UMC, and that allegation may apply to this 2nd Cause of Action. Thus, this cause of action is uncertain, and plaintiff is required to clearly allege whether UMC is liable under this claim. (CCP § 430.10(f)) The court also notes that although plaintiff has listed the names of the individual defendants at the top of this Cause of Action, he seems to actually allege that he does not know who is allegedly liable for the (apparent) improper conduction of the test. Thus, plaintiff is also required to clearly allege which defendants he believes are liable under this claim.

Second, it appears that plaintiff has alleged the "Intentional Tort" of battery. As such, he has failed to allege specific and sufficient facts to demonstrate (1) that defendant intentionally performed an act which resulted in a harmful or offensive contact with the plaintiff's person, and which specifically describe that act, (2) that plaintiff did not consent to the contact, and (3) that the specific harmful or offensive contact caused an injury, damage, loss or harm to plaintiff, and which specifically identify such alleged injury, damage, loss or harm. (See, e.g., Calif. Jury Instructions, Civil, 8th Ed. ("BAJI"), Instruction 7.50.) Thus, the demurrer to this cause of action is sustained on the basis that plaintiff has failed to state a cause of action. (CCP § 430.10(e)) However, plaintiff is allowed leave to amend, because there is a reasonable possibility that he can state a valid cause of action for battery. (***Blank v. Kirwan, supra.***)

The demurrer to the 3rd Cause of Action for Premises Liability is also sustained, because the allegations are uncertain and because plaintiff has failed to state a cause of action. (CCP §§ 430.10(f) and 430.10(e)) To support a claim for premises liability, the plaintiff must allege facts which

demonstrate (1) that the defendant was the owner, occupant, or lessor of certain premises, and must identify the specific premises at issue, (2) how said defendant was negligent in the use, maintenance or management of such premises, and (3) how this negligence was a cause of a particular injury, damage, loss, or harm to the plaintiff. Plaintiff must also specifically identify the specific injury, damage, loss or harm. (See, e.g., Weil & Brown, supra, at § 6:213, and BAJI 8.00 and 8.01.) Here, the complaint contains no factual allegations supporting any of these elements. That is, plaintiff does not even specifically identify the premises involved, or any portion of the premises, upon which an injury might have occurred. He does not even identify the injury itself. Further, plaintiff fails to factually allege the capacity of UMC in relation to the premises, how UMC was negligent, and how such negligence caused injury or harm to plaintiff. Thus, the complaint is uncertain as to how or why UMC may be liable under this cause of action, and the allegations fail to properly and sufficiently state a cause of action. Thus, the demurrer is sustained, but plaintiff is allowed leave to amend, because there is a reasonable possibility that he can state a valid cause of action for premises liability. (***Blank v. Kirwan, supra.***)

Finally, UMC's motion to strike the claim for exemplary or punitive damages is granted. The court finds that each cause of action alleged by plaintiff is directly related to some form of professional services provided by either the individual defendants or by UMC in their capacities as health care providers. Thus, plaintiff may not allege a claim for punitive damages until he has complied with CCP § 425.13. (See also ***Central Pathology Service Medical Clinic, Inc. v. Superior Court*** (1992) 3 Cal.4th 181, 191-192.) However, the motion is granted without prejudice, because plaintiff is not precluded from bringing an appropriate motion under § 425.13 in the future.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order, and the time in which plaintiff may filed a First Amended Complaint will run from service by the clerk of the minute order.